

A Re Chloride Eastern Industries

HIGH COURT (JOHORE BAHRU) — ORIGINATING PETITION NO 26-3-1993

HAIDAR J

B HAIDAR J
18 SEPTEMBER 1995

Companies and Corporations — Petition by minority shareholder — Unfair discrimination and oppression — Whether the act of allotment of shares created rights as member — Whether bona fide petition — Companies Act 1965 s 181

C The company offered to the petitioner to subscribe to preference shares 'B' in the amount of RM2.5m including premium which was accepted by the petitioner. The preference shares 'B' were only allotted to the petitioner some five months later as the company had to amend art 4B of its memorandum and articles of association to incorporate the modified terms and conditions in relation to preference shares 'B'. The company sought to further amend art 4B. The resolution was put before the AGM but was not carried. D The company subsequently issued notice to the petitioner that it would redeem the shares from the petitioner. The company also gave the petitioner an option to convert its shares to ordinary shares, and should the petitioner reject the option, the preference shares 'B' would be redeemed on a certain date after which date the petitioner would cease to be a shareholder of the company. E The petitioner filed a petition under s 181 of the Companies Act 1965 for an order that the company do redeem the preference shares 'B' at RM2.5m, the particulars of unfair discrimination and oppression F being (a) the non-payment of dividends in respect of the financial year ending 31 December 1991; (b) the refusal to accord the petitioner voting rights similarly enjoyed by holders of ordinary shares for the year 1992; (c) the failure to agree on compensation in lieu of a dividend payment; (d) the denial to accord the petitioner G the right to vote at the EGM at which resolutions to amend the memorandum and articles of the company were passed to create a class of preference shares 'D'; (e) the failure to amend the redemption provisions of art 4B.

Held, dismissing the petition:

I (1) The petitioner could not assert rights as a shareholder (including the right to claim for dividends) until it was actually registered as such. Until that time, it was only at most in the position of an applicant for an issue of shares or possibly as a special creditor. An allotment of itself did not necessarily create the status of membership even when the contract to take the shares was complete. The shareholder must first be registered as such before he could assert his rights.

- (2) As registration of the petitioner as a holder of preference shares 'B' was after 7 May 1992, any rights that it might have for dividends or default of dividends could accrue only after that date. A
- (3) The petitioner had no voting rights at the meeting held in 1992 at which it was resolved to create the preference shares 'D'. B
- (4) Moreover, the creation of preference shares 'D' was with the object of injecting greater capital into the company which would benefit the company and ultimately the petitioner.
- (5) It was clear that the use of s 181 action by the petitioner was for the collateral purpose of being paid out preferentially. The petitioner's aim was to withdraw its investment at the original investment price which was clear from its refusal to accept conversion of the shares into ordinary shares. The main objective of the petitioner in investing in the company was because of the proposed listing of the company which unfortunately failed. C D
- (6) The petition was in the circumstances not bona fide.

[Bahasa Malaysia summary]

Syarikat itu menawarkan kepada pempetisyen untuk membeli syer keutamaan 'B' berjumlah RM2.5 juta termasuk premium yang diterima oleh pempetisyen. Syer keutamaan 'B' cuma diumpukkan kepada pempetisyen kira-kira lima bulan kemudian kerana syarikat itu terpaksa meminda perkara 4B memorandum dan perkara persatuan untuk memasukkan terma dan syarat yang diubah suai berkenaan dengan syer keutamaan 'B'. Syarikat itu cuba untuk meminda selanjutnya perkara 4B. Resolusi itu dikemukakan kepada Mesyuarat Am Tahunan tetapi tidak diluluskan. Syarikat itu kemudiannya mengisu notis kepada pempetisyen bahawa ia akan menebus syer itu dari pempetisyen. Syarikat itu juga memberikan pempetisyen opsyen untuk menukar syernya kepada syer biasa, dan jika pempetisyen menolak opsyen itu, syer keutamaan 'B' itu akan ditebus pada satu tarikh tertentu dan selepas tarikh itu pempetisyen tidak akan lagi menjadi pemegang saham syarikat itu. Pempetisyen memfailkan satu petisyen di bawah s 181 Akta Syarikat 1965 untuk satu perintah bahawa syarikat itu menebus syer keutamaan 'B' itu pada harga RM2.5 juta, butir-butir diskriminasi tak adil dan penindasan adalah (a) kegagalan membayar dividen berkenaan dengan tahun kewangan berakhir 31 Disember 1991; (b) keengganan memberikan pempetisyen hak mengundi yang dinikmati oleh pemegang saham biasa untuk tahun 1992; (c) kegagalan mempersetujui pampasan sebagai ganti bayaran dividen; (d) kegagalan memberikan pempetisyen hak mengundi di Mesysarat Am Luarbiasa di mana resolusi untuk meminda memorandum E F G H I

- A dan perkara syarikat itu telah diluluskan untuk membentuk satu kelas syer keutamaan 'D'; (e) kegagalan meminda peruntukan untuk penebusan di dalam perkara 4B.

Diputuskan, menolak petisyen itu:

- B (1) Pempetisyen tidak boleh menegaskan hak sebagai satu pemegang saham (termasuk hak untuk menuntut dividen) sehingga ia sebenarnya didaftar sebagai satu pemegang saham. Sehingga masa itu, ianya cuma paling banyak pun berada di dalam kedudukan satu pemohon untuk satu terbitan syer atau mungkin sebagai satu pemiutang khas. Pengumpulan dengan
- C sendirinya tidak semestinya membentuk status keahlian biarpun bila kontrak untuk mengambil syer dilengkapkan. Pemegang saham mesti terlebih dahulu didaftar sebagai pemegang saham sebelum ia boleh menegaskan haknya.
- D (2) Oleh kerana pendaftaran pempetisyen sebagai pemegang syer keutamaan 'B' dibuat selepas 7 Mei 1992, apa-apa hak yang mungkin dipunyainya untuk dividen atau keingkaran membayar dividen cuma boleh terakru selepas tarikh itu.
- (3) Pempetisyen tidak mempunyai hak mengundi di mesyuarat yang diadakan dalam tahun 1992 di mana telah dibuat resolusi untuk membentuk syer keutamaan 'D'.
- E (4) Lagipun, pembentukan syer keutamaan 'D' adalah bertujuan mengemukakan modal yang lebih ke dalam syarikat itu yang akan membawa faedah kepada syarikat itu dan akhirnya pempetisyen.
- F (5) Adalah jelas bahawa penggunaan tindakan s 181 oleh pempetisyen adalah untuk tujuan sampingan supaya dibayar secara keutamaan. Tujuan pempetisyen adalah untuk menarik balik pelaburannya pada harga pelaburan asal. Ini adalah jelas dari keengganannya untuk menerima penukaran syer itu kepada syer biasa. Tujuan utama pempetisyen dalam melabur di dalam
- G syarikat itu adalah kerana penyenaraian syarikat itu yang dicadangkan yang malangnya gagal.]

Notes

- H For cases on petitions under s 181 of the Companies Act 1965, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 535.

Cases referred to

- Bellador Silk Ltd, Re* [1965] 1 All ER 667 (folld)
- Bradford Investments Ltd* [1991] BCLC 224 (refd)
- I *British American Nickel Corp v M J O'Brien Ltd* [1927] AC 369 (refd)
- King's Motors (Oxford) Ltd v Lax & Anor* [1970] 1 WLR 426; [1969] 3 All ER 665 (refd)

Kong Thai Sawmill (Miri) Sdn Bhd, Re [1978] 2 MLJ 227 (folld) A
Raja Khairulzaman Shah bin Raja Aziiddin v Zaman Indah Sdn Bhd
 [1979] 2 MLJ 181 (refd)
Senson Auto Supplies Sdn Bhd [1988] 1 MLJ 332 (refd)
Spargos Mining NL, Re (1992) 3 ACSR 1 (folld)

John Selvam (Dass, Jainab & Associates) for the petitioner. B
M David Morais (M David Morais) for the respondent.

Haidar J: On 19 August 1995 I dismissed with costs the originating petition of Chloride Eastern Industries Pte Ltd ('petitioner') against Premium Vegetable Oils Sdn Bhd ('company') and indicated that I C
 I would give my reasons in writing later. In the meantime, the petitioner has filed an appeal against my said order.

The originating petition is filed under s 181 of the Companies Act 1965 ('the Act'). Section 181(1) and (2) of the Act reads:

- (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground — D
 - (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or E
 - (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself). F
- (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may — G
 - (a) direct or prohibit any act or cancel or vary any transaction or resolution;
 - (b) regulate the conduct of the affairs of the company in future;
 - (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself; H
 - (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
 - (e) provide that the company be wound up.

At the time of the filing of the petition, the petitioner is the holder of I
 preference shares 'B' in the value of RM2.5m.

From encl 2A at p 10 thereof of the petition, the petitioner is praying for the following orders:

- A** (i) That Premium Vegetable Oils Sdn Bhd (formerly known as Premier Nalin Sdn Bhd) ('the company') be ordered to redeem the Preference Shares 'B' from the petitioner with no loss of value at RM2.5m.
- (ii) Further and/or alternatively the members of the company purchase the preference shares 'B' from the petitioner with no loss of value at RM2.5m.
- B**
- (iii) Further and/or alternatively:
- (a) That the company be ordered to pay a dividend of 95% per annum to the petitioner from 24 December 1992 that is from the date subscription moneys was received by the company.
- C**
- (b) That the compensation of dividend to be mutually worked out between the company and the petitioner.
- (c) That the petitioner nominate a director to the board of the company.
- D**
- (d) That the company convene an extraordinary general meeting within 30 days of the order to carry the motion to incorporate the terms and conditions in relation to the Preference Shares 'B' as contained in the letter dated 23 June 1992 from the company irrespective of whether a quorum and the majority of shareholders are present at the said extraordinary general meeting to carry the motion.
- E**
- (e) That the resolution passed by the extraordinary general meeting on 28 April 1992 pertaining to the new class of shares called preference shares 'D' and the class rights relating to it are rescinded and cancelled.
- F**
- (iv) Costs.
- (v) That such other order may be made in the premises as shall be just.

G It is supported by the affidavit of Winston Wong Teng Kay, a Singapore citizen, who is the company secretary of the petitioner (encl 3A).

The company was on 17 May 1978 incorporated under the Act. By way of exh P2A, the share capital of the company as at 10 December 1991, is RM28,500,000 divided into 20,000,000 ordinary shares of RM1 each, 500,000 preference shares 'A' of RM1 each and 8,000,000 preference shares 'B' of RM1 each all having the rights and obligations set out below; except for preference shares 'B' whose rights and obligations would be decided by the board of directors at the time of issue of such shares.

H

FACTS

I The company vide letter dated 10 December 1991 (exh 'WW-8' in encl 8) offered to the petitioner to subscribe to preference shares 'B' in the amount of RM2.5m including premium. Enclosed therewith are the

terms and conditions of the proposed preference shares 'B'. The purpose of the offer was to raise additional capital of the company. As the issue is centred on the offer and its terms and conditions, it is in my view appropriate that I state in full the terms and conditions. They are:

Premier Nalin Bhd

Terms and Conditions for issue of Preference 'B' Shares

- | | | | |
|---|-----------------------|--|---|
| 1 | Issuing company: | Premier Nalin Bhd | A |
| 2 | Nature of instrument: | Preference 'B' Shares — redeemable, non-cumulative convertible — face value of RM0.10 per share. | B |
| 3 | Amount: | RM2,500,000 (including premium). | C |
| 4 | Issue price: | RM0.10 per share at a premium of RM0.90 per share. | |
| 5 | Dividend rate: | 95% pa payable at the end of five months of close of the accounting year out of tax exempt profits. | D |
| 6 | Redemption: | In two equal instalments at the end of the fourth and fifth year from date of issue or earlier at the option of the company by giving three months' notice. | |
| 7 | Conversion: | <p>(a) At the option of the subscriber, at any time before redemption of shares by giving three months written notice to the company, into ordinary shares of the company.</p> <p>(b) The conversion price into ordinary shares will be determined on the basis of the following formula:</p> <p>Average PE Ratio of equity shares for the immediate past two accounting periods multiplied by seven (7).</p> <p>Value of these preference shares for the purpose of conversion shall be considered at RM1 per share.</p> | E |
| | | | F |
| | | | G |
| 8 | Other conditions: | <p>(i) In case no dividend is declared and/or paid for any accounting period from the date of issue, compensation in rate of dividends for future period shall be worked out by mutual agreement.</p> <p>(ii) In case no dividend is declared and/or paid for any accounting period (inclusive of premium) from date of issue and/or the principal amount is not redeemed on due date the subscriber has the following rights:</p> <p>(a) voting right similarly enjoyed by holders of ordinary shares in the company;</p> | H |
| | | | I |

- A (b) right to nominate a director on the Board of the company.

9 Miscellaneous: Other rights and obligations of the company and the subscriber as are normal for such shares.

- B In addition thereto, the company also enclosed the projected profit and loss account and balance sheet of the company for the next five years.

On the same day, that is, 10 December 1991, the petitioner held a board of directors' meeting accepting the offer. In a brief cross-examination of Winston Wong Teng Kay, a witness of the petitioner, a true extract of the minutes of the said board meeting held on the same day, that is, 10 December 1991 was produced and marked as 'P1'. The minutes read:

- C 9 Investments
- The board resolved that the following investments be made:
- D (a) ...
- (b) 2.5 million redeemable non-cumulative convertible Preference 'B' shares (par value RM0.10) at premium of RM0.90 per share in Premier Nalin Bhd amounting to RM2.5m.

The 'C' Shares ...

- E The 'B' Shares in Premier Nalin Bhd carry a dividend rate of 95% and are redeemable in two equal instalments at the end of the fourth and fifth year. The shares may be converted into ordinary shares at a conversion price equal to the average price earnings ratio of equity shares for the immediate past two accounting periods multiplied by seven (7).

- F On 10 December 1991 itself the company passed a resolution by circulation accepting the subscription of preference shares 'B' (see exh CEI-2 in encl 3A). CEI-2 reads:

- G Resolved that the company do accept subscription to the preference shares 'B' in the capital of the company from Chloride Eastern Industries Ltd for a total amount of RM2,500,000 (including the premium amount) subject to the terms and conditions as informed to the Board.

- H Further resolved that the company is authorized to accept the subscription amount towards the said preference shares and allot the shares as soon as all the formalities are completed. However, it is expressly resolved that the dividend will be payable pro rata from the date the subscription money is received.

Further resolved that any one of Messrs YB Dato KR Somasundram or HRK Murthy directors of the company be and is hereby authorised to negotiate and finalise terms and conditions with or without modifications as may be deemed necessary.

- I Further resolved that the meeting of the shareholders of the company be convened to amend the memorandum and articles of association of the company to incorporate the modified terms and conditions, in relation to preference shares 'B'.

In short, the invitation to subscribe for preference shares 'B' was made on 10 December 1991 and accepted on the same day. A

Article 4B of the articles of association of the company was subsequently amended on 11 April 1992 to incorporate the terms set out in WW-8 (see p 70 of CEI-2 in encl 3A).

On 20 December 1991 the petitioner issued an instruction to its bankers to remit the subscription price of RM2,500,000 to the company and that the said sum was received on 24 December 1991 (see exh CEI-3). B

The preference shares 'B' were only allotted to the petitioner on 7 May 1992 subsequent to the amendment of art 4B. C

Subsequent to the allotment of the preference shares 'B' the petitioner entered into correspondence with the company seeking a further amendment to art 4B. The amendment requested was to amend the redemption provisions of art 4B to provide that redemption will be at RM1 per share (including a premium of RM0.90 per share). The resolution to make the amendment was put before the annual general meeting of the company on 28 April 1995 and was not carried. D

On 11 May 1995 the company issued notice to the petitioner that it will redeem preference shares 'B' from the petitioner. The notice expires on 21 August 1995 (20 August being a Sunday). In the said notice the company gave the petitioner an option to convert its shares to ordinary shares. In view of the petitioner's rejection of the option to convert, the preference shares 'B' will be redeemed on 21 August 1995 after which date the petitioner will cease to be a shareholder of the company (see exhs 'PNA-7', 'PNA-8', 'PNA-9' and 'PNA-11'). E F

As the petition is filed pursuant to s 181 of the Act, the essence of the complaint of the petitioner is unfair discrimination and oppression.

The particulars of the alleged discrimination and oppression may be summarized as follows: G

- (a) the non-payment of dividends in respect of the financial year ending 31 December 1991;
- (b) the refusal to accord the petitioner voting rights similarly enjoyed by holders of ordinary shares for the year 1992;
- (c) the failure to agree on compensation in lieu of a dividend payment;
- (d) the denial to accord the petitioner the right to vote at the extraordinary general meeting of the company held on 28 August 1992 at which resolutions to amend the memorandum of articles of the company were passed to create a class of preference shares 'D'; H I
- (e) the failure to amend the redemption provisions of art 4B of the memorandum of articles of the company.

A (a) *Dividends*

The petitioner's assertion is that having paid the subscription of RM2,500,000 on 24 December 1991 (which is admitted by the company), it is entitled to a pro rata dividend for that year. At issue here is the allotment of the shares and registration of the petitioner as a shareholder. The petitioner contended that allotment takes effect upon receipt of the payment of the subscription as reflected in the audited reports and accounts for the year ended 31 December 1991 of the company. If it is otherwise then the accounts would have stated expressly that preference shares 'B' were held in trust, say, in the Share Application Moneys Account and relied on the passages at pp 164-166 of *Guide to Company Law in Malaysia & Singapore* (2nd Ed).

The company's counsel submitted that the petitioner cannot claim an absolute right to a dividend as it appears to be doing. In support thereof, he relied on *Palmer's Company Law*, Vol 6, where at p 6043, the learned author said:

D ... Unlike the debenture holder, the preference shareholder who, after all, is a shareholder, is only entitled to income from his investment if a distributable profit within the meaning of the law is available. His right is not to dividend but to preferential treatment if and when a dividend is distributed.

E Section 365 of the Act provides that dividends cannot be paid except out of profits or from a share premium account (under s 60). However, s 60 has no application in this case as art 4B specifically provides that the dividend be paid out of tax exempt profits.

F As the petitioner itself has affirmed, the company suffered a net loss of RM4,108,138 and RM11,944,387 for the years ending 31 December 1991 and 31 December 1992 respectively (see para 28 of encl 24). Hence, no dividends were payable.

G The company further contended that the petitioner's entitlement to any benefit as a preference shareholder 'B' can only accrue after the shares have actually been allotted and it is registered as a shareholder. Therefore, the purported agreement to pay dividends on a pro rata basis from the date of subscription must necessarily be taken in the context of legal obligation and right. The petitioner then cannot assert any rights as a shareholder until it is actually registered as such. Until that time, the petitioner is only at most in the position of an applicant for an issue of shares or possibly as a special creditor. The legal effect of an allotment was considered by Abdoolcader J (as he then was) in *Raja Khairulzaman Shah bin Raja Aziddin & Ors v Zaman Indah Sdn Bhd* [1979] 2 MLJ 181 where at p 183, His Lordship said:

I ... To the extent to which money is paid in advance on calls, the shareholder is a creditor of the company (*Lock v Queensland Investment and Land Mortgage Co* (at p 407 per Kay LJ, affd [1986] AC 461); but he is not an ordinary creditor, for he cannot demand repayment of the money so paid, and the company cannot repay it unless the articles so provide (ibid). The legal effect of an allotment, which is an appropriation to a person of a certain number of shares but not necessarily of any

specific shares, depends on circumstances, for it may be an offer of shares to the allottee or an acceptance of an application for shares by him, but an allotment of itself does not necessarily create the status of membership, even when the contract to take the shares is complete (*Spitzal v Chinese Corporation Ltd*). A resolution to allot shares is not necessarily the issue of them, as the term 'issue' would appear to mean allotment followed by registration or possibly by some other act, distinct from allotment, whereby the title of the allottee becomes complete (*Clarke's case*). ...

In the circumstances and in view of the law and statutory provisions I have discussed I cannot see that the plaintiffs have the right or are entitled to demand as of right that they be entered on the register of members in respect of the shares they paid for on the third call by the company or that they be issued the share certificates therefor immediately on payment being made. If they are not so entitled there is no right to be protected and they cannot therefore claim relief by way of the injunction sought, and consequentially the matter of mala fides attributed by the plaintiffs to the other three directors of the company does not arise for consideration.

The effect of the judgment in *Raja Khairulzaman* is that even allotment is not sufficient to confer rights. The shareholders must first be registered as such before he can assert his rights. In this case the registration of the petitioner as preference shareholder 'B' was after 7 May 1992. As a result, I am of the view that any rights that it may have for dividends or default of dividends could accrue only after 7 May 1992.

(b) *Voting rights*

In respect of voting rights similarly enjoyed by holders of ordinary shares and the right to nominate a director, they are provided for in condition 8(ii) of the offer. Those rights will arise if no dividend is declared and/or paid for any accounting period and/or the principal amount is not redeemed on due date.

As I have ruled that the petitioner's right only accrue after 7 May 1992, the petitioner can only claim a right to vote in respect of dividend not paid for the year ending 31 December 1992, if at all. That right, if any, would accrue after the accounts are submitted for the year ending 1992 which is by 31 May 1993. In that event, any right to vote arising out of unpaid dividends can only arise for the year 1993. Neither has the petitioner asserted in its petition nor was it in fact denied any right to vote at the shareholders' meetings of the company in 1993.

In any event I am of the view that since no dividend is legally payable by virtue of the company not posting any profit, no default rights as provided by conditions 8(ii)(a) and (b) arise. Clearly those rights only arise in the event of a dividend being payable but not actually paid or declared by the company.

In this case there is no article providing for 'shall be deemed to be payable' provision as was decided in *Re Bradford Investments Ltd* [1991] BCLC 224. As no dividend could in any case be paid in 1991 and 1992, no right to vote could accrue on the petitioner.

A (c) *Compensation*

The petitioner contended that the company failed to agree on compensation in default of payment of dividends for 1991 and 1992, the short answer to that is that it does not arise for reasons given earlier that the right only accrues in default of dividend payments.

B In any event, the question of compensation is to be according to art 4B 'worked out by mutual agreement'. In short, it is an agreement to agree which is illustrative of a contract void for uncertainty (s 30 of the Contracts Act 1950). In this respect, Burgess VC in *King's Motors (Oxford) Ltd v Lax & Anor* [1970] 1 WLR 426; [1969] 3 All ER 665 at p 666 said:

C The argument for uncertainty is that as the rent was not agreed and was left to be agreed; unless the parties agree — if you like to put it that way — to play the game together and agree, the contract is unenforceable and is void for uncertainty. In substance it amounts to no more than a contract to enter into a contract which is always given as the classic example of an agreement which is unenforceable.

D Therefore the claim for compensation is untenable.

The claim for compensation, in any event, is not credible as the petitioner never raised the issue of compensation during the entire shareholding nor approached the company to discuss the same.

E (d) *Preference shares 'D'*

In respect of the issue of the petitioner's rights to attend and vote at the meeting held on 28 August 1992 at which it was resolved to create preference shares 'D', for the reasons stated earlier, the petitioner had no voting rights in 1992.

F As regards to the petitioner's complaint of unfair discrimination in respect of the creation of preference shares 'D' it is to be noted that such creation was with the object of injecting greater capital into the company who was making a loss in 1991 and the situation was bad in 1992. The injection of the capital in the form of preference shares 'D' to the tune of 13,807,200 shares, in my view, would benefit the company and ultimately the petitioner though the benefits may not be equally shared by all the shareholders. In this respect, Viscount Haldane in *British American Nickel Corporation v Mf O' Brien Ltd* [1927] AC 369 said:

H There is however, restriction of such powers, when conferred on a majority of a special class in order to enable the majority to bind a minority. *They must be exercised for the purpose of benefiting the class as a whole and not merely individual members only.* (Emphasis added.)

I In the circumstances the petitioner's complaint of unfair discrimination in respect of the creation of preference shares 'D' did not carry much weight as the shares carry some rights which are more beneficial and others which are less beneficial than preference shares 'B'. As the purpose behind the issue of the preference shares 'D', as I said earlier,

is clearly for the best interest of the company, it cannot be said to be discriminatory or oppressive of the petitioner. A

No doubt the petitioner has the right to raise the issue of preference shares 'D' as a complaint under s 181, if it was genuinely aggrieved by the creation of preference shares 'D', the petitioner could have taken expeditious and effective remedial steps under s 65. The petitioner could very well proceed with an application after the resolution was passed on 28 August 1992 to have the creation of preference shares 'D' stayed pending the determination of the court to have the issue cancelled but instead to include the cancellation of the preference shares 'D' as a relief when I was advised that the preference shares 'D' had been taken up by the time the petition is filed. In my view it denotes the lack of bona fide on the part of the petitioner's action. B C

(e) Amendment of art 4B

It was alleged by the petitioner that the company agreed to amend art 4B to provide for redemption at RM1 per share in order to remove any ambiguity as regard to redemption and conversion value as embodied in the circular resolution dated 10 December 1991 (exhs 'CEI-13' to 'CEI-18'). D

It is to be noted that if there is any ambiguity, this matter should be resolved first between the parties before the amendment to art 4B was made in April 1992 or perhaps at the latest before the allotment of the preference shares 'B' in May 1992. This the petitioner failed to do until very much later. E

In any event the commitment on this issued by the company as claimed by the petitioner is in reference to the letter dated 23 June 1992 issued by one Mr DK Agarwal (exh 'CEI-11'). However, in my view, as rightly pointed out by the company's counsel, it will have to be in the light of exhibit 'CEI-2' where the persons authorised to negotiate and finalise the terms and conditions of the offer with or without modifications as may be deemed necessary rested only with YB Dato KR Somasundram or Mr HRK Murthy and not with Mr DK Agarwal. In the event therefore there was no binding agreement to amend art 4B as claimed by the petitioner. F G

In any event, even if the authority of DK Agarwal can be said to be impliedly authorised by the company in respect of the amendment of art 4B, such amendment could only be made by way of special resolution at the general meeting of the company. A special resolution to amend art 4B was included in the agenda of the meeting of the company on 28 April 1995 but the resolution was not carried out (see exh 'PNA-18'). H

Whatever grounds may be put forth by the petitioner in respect of the object of its investment in the company, WW-8 clearly showed that the petitioner before accepting the offer was fully aware of the listing proposal and I quote: I

Further barring unforeseen circumstances we intend listing of the equity shares of the company in the Kuala Lumpur Stock Exchange during 1993

A and this would mean that your investments would be liquid with considerable capital appreciation. (Emphasis is mine.)

I am inclined to accept that upon failure of the company to get public listing, the petitioner tried to pressure the company on the redemption value.

B
CONCLUSION

C From the facts it would seem clear to me that the use of s 181 action by the petitioner was for the collateral purpose of being paid out preferentially. I say so as the petitioner's aim is to withdraw its investment at the original investment price (on top of the dividends which were paid for 1993 and 1994) is clear from its refusal to accept conversion of their shares to ordinary shares, notwithstanding a bonus issue (see exhs 'PNA-7', 'PNA-8' and 'PNA-11' of encl 22). As I said earlier, the main objective of the petitioner in investing in the company is because of the proposed listing of the company which unfortunately failed.

D Given such a situation then the court ought properly to dismiss the petition. In this respect Plowman J in dealing with s 210 (equivalent to our s 181) at p 671 in *Re Bellador Silk Ltd* [1965] 1 All ER 667 said:

E I have thought it right briefly to review the facts and to state my findings on them but, if I have done so somewhat curiously, it is because in my judgment, this case must fail for different reasons. First and foremost is the reason that I do not regard this petition as a bona fide attempt to obtain relief under s 210 at all. It became obvious during Moss Simmons' cross-examination that he did not really want the relief for which he was asking in the petition and that its real object was to achieve a collateral purpose, namely, to get some satisfaction in regard to the repayment to Bellador Ltd, or to the Simmons Group of companies of the outstanding loan ...

Further on at p 672 his Lordship said:

G A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that I would dismiss this petition.

H *Bellador Silk Ltd's* case was considered by Edgar Joseph Jr J (as he then was) in considering a similar point in *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ at p 332. His Lordship said:

I First, I regard with considerable scepticism the bona fides of the petitioners in presenting this petition in order to obtain relief from alleged oppression, having regard to the alternative prayer in it for 'rescission of all those shares allotted to the petitioners on 30 April 1986, and the repayment of \$25,381 paid therefore'. There is authority for saying that even if the directors or equity shareholders had been guilty of improper or unreasonable conduct so that there appears to be a prima facie case for relief, it will be refused if the real purpose of the petitioners is to obtain payment of money owed by the company (see *Bellador Silk Ltd*).

The reliefs sought are put in a number of alternative prayers. Amongst the reliefs sought which could properly show the lack of bona fide of the petition are: A

- (1) Prayer (iii) seeks a winding up of the company when in fact the company has been posting profits since 1993 and prior to 1991. What then is the basis for such a prayer? B
- (2) Prayer (iv)(a) seeks an order of the court to order a dividend from 24 December 1992 where no profits were posted in 1991 and 1992. This would be illegal.
- (3) Prayer (iv)(b) seeks for an order for compensation to be mutually agreed between the parties which in effect is asking the parties to agree to agree. C
- (4) Prayer (iv)(e) seeks the rescission and cancellation of the resolution pertaining to the new class of preference shares 'D'.

There was ample opportunity for the petitioner to take expeditious steps to stop the creation of preference shares 'D' by invoking s 65 of the Act but failed to do so for reasons best known to itself. D

While it may be true that some authorities would seem to indicate that the court will take into account isolated acts of discrimination of the past, but in the main the court is interested to see whether or not a continuing state of oppression subsists at the time of the hearing of the petition and whether there is a propensity for oppression (see *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at p 229 and *Re Spargos Mining NL* (1992) 3 ACSR 1). The facts and the law do not seem to show a continuing state of oppression and there is no propensity for oppression. E

At the time of the hearing of the petition, a three months' notice was issued by the company to redeem preference shares 'B' from the petitioner. The notice expires on 22 August 1995 (21st being a Sunday). The petitioner, it seemed has rejected the offer to convert the shares. It would appear clearly that the petitioner is more interested in getting back its money on the purchase of its preference shares 'B' at its face value of RM2.5m as indicated in prayers (i) and (ii). F G

On this ground of lack of bona fide in the filing of the petition alone, I should primarily dismiss the petition.

Quite apart from this ground, I was satisfied that the petitioner failed to satisfy me on the facts and the law for the court to exercise its powers under s 181 of the Act. H

In the circumstances I dismissed the petition with costs.

Petition dismissed.

Reported by Rebecca MK Lee I